

OCT 6 1977

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,
Petitioner,

vs.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Respondent.

SECOND
SUPPLEMENTAL BRIEF
ON
PETITION FOR WRIT OF MANDAMUS
TO LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK.

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108
Petitioner

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"A RECENT DECISION"

Subsequent to the filing of this petition, two companion cases have been reviewed by the Court of Appeals of the State

of New York. In these two decisions, the New York Court of Appeals issued definitive case law which should govern the matter in question herein.

1. A subpoena cannot be used as authorization to "take possession" of records, property, etc.
2. The act of seizing and holding this petitioner's records is contrary to the authority granted the Attorney General of the State of New York pursuant to Executive Law.
3. "Res judicata" is no defense and pending civil litigation cannot serve to justify taking possession and holding records obtained through a subpoena.

The above three principles are clearly set forth in the cases. The cases were reported in the New York Law Digest, No. 213. The appropriate excerpts are herein quoted:

"However, the authorization to conduct an inquiry and issue subpoenas is not an authorization to take possession of books and records for examination and audit. Section 63, subd. 8, of the Executive Law did not authorize the Special Prosecutor to retain custody of the documents". (Matter of Windsor Park Nursing Home v Hynes, _____ N.Y.2d_____) (July 7, 1977) (N.Y.S. Law Digest, No. 213).

"It did not authorize the seizure, impoundment or other disruption in possession of records or property. It was improper for the court to give the prosecutor unsupervised possession of the witness' books and records on the basis of the subpoena alone. If the circumstances warranted impoundment or other lawful interference with possession of records or property, authorization for the imposition of

such a condition must be grounded on powers and procedures not inherent in the subpoena.... Impoundment is a measure so drastic that it must be exercised by or solely on behalf of a court itself." (Heisler v Hynes, _____N.Y.2d_____) (July 7, 1977) (N.Y.S. Law Digest No. 213).

CONCLUSION

The above two quoted cases from the N.Y. Court of Appeals, totally destroys the attempted defense set forth in respondents brief herein. There is no defense to petitioner's claim that the Attorney General holds petitioner's records illegally. Moreover, returning to the more important issue, petitioner faces a criminal trial without these records which are vital to him. He has sought relief in the State Courts of the State of New York and has been denied. McMillen's claim of jurisdiction in the Supreme Court remains valid that it is urgent and necessary to protect his constitutional rights to a speedy and fair criminal trial. Accordingly, the writ should be granted.

Respectfully submitted,

James D. McMillen
5325 Sanders Road
Toledo, Ohio 43615
(419) 385-5108

Dated: October 5, 1977